STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **74 WYTHE RESTAURANT COMPANY LLC** for Revision of Determinations or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2013 through February 29, 2016 and March 1, 2017 through August 31, 2019.	DETERMINATION DTA NOS. 830440, 830441, 830526, 830527, 850382 AND 850405
In the Matter of the Petition of **SHAWN H. SCHWARTZ** for Revision of a Determination or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2017 through August 31, 2019.	
In the Matter of the Petitions of **NICOLAS MATAR** for Revision of Determinations or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2013 through February 29, 2016 and March 1, 2017 through August 31, 2019.	

In the Matter of the Petition of **ROBERT T. PITTMAN** for Revision of a Determination or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2017 through August 31, 2019.	:

Petitioners, 74 Wythe Restaurant Company LLC, and Nicolas Matar, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for period December 1, 2013 through August 31, 2019.

Petitioners, Shawn H. Schwartz and Robert T. Pittman, filed petitions for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2017 through August 31, 2019.

A hearing was held before Alejandro G. Taylor, Administrative Law Judge, in Brooklyn, New York, on October 2, 2024 and continued to completion on October 3, 2024, with all briefs to be submitted by March 18, 2024, which date began the six-month period for the issuance of this determination. Petitioners appeared by Hodgson Russ, LLP (Joseph P. Endres, Esq. and Ariele Doolittle, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Aliza Chase, Esq., of counsel).

ISSUES

I. Whether admission charges to petitioners' venue were subject to sales tax pursuant to Tax Law § 1105 (f) (1), as admission charges to a place of amusement.

II. If not, whether admission charges to petitioners' venue were subject to sales tax pursuant to Tax Law § 1105 (f) (3), as admission charges to a cabaret, roof garden, or similar place.

III. If not, whether admission charges to petitioners' venue were subject to sales tax pursuant to Tax Law § 1105 (d), as entertainment charges to be included in taxable receipts of the sale of food or beverages.

IV. Whether the notices of determination, dated September 8, 2020, and September 16, 2020, were valid.

FINDINGS OF FACT

Pursuant to State Administrative Procedure Act (SAPA) § 307 (1) and 20 NYCRR 3000.15, petitioners submitted 288 proposed findings of fact. Petitioners' proposed findings of fact 1 - 4, 6, 8, 18, 20 - 30, 35 - 37, 40 - 44, 46, 50, 51, 53 - 58, 60 - 62, 64 - 68, 77, 79, 80, 86, 88, 90 - 94, 98 - 101, 103 - 109, 111, 112, 114 - 117, 120 - 126, 128 - 129, 139 - 143, 148, 190 - 192, 194, 198 - 213, 217 - 231, 233, 235 - 245, 255, 257, 258, 260, 262, 263, 269 - 286, and 288 are supported by the record and substantially incorporated into the findings of facts below. Petitioners' proposed findings of fact 5, 7, 9 - 17, 19, 31 - 34, 38, 39, 45, 47, 49, 52, 59, 63, 69 - 76, 78, 81 - 85, 87, 89, 95 - 97, 102, 110, 113, 119, 127, 130 - 138, 144 - 147, 149 - 189, 193, 195 - 197, 214 - 216, 232, 234, 246 - 254, 256, 259, 261, 264 - 268, and 287 are rejected as irrelevant or immaterial to the legal questions presented. Petitioners' proposed findings of fact 48 and 118, are accepted in part insofar that they are supported by the record and rejected in part as irrelevant or immaterial to the legal questions presented.

1. During the period at issue, petitioner, 74 Wythe Restaurant Company LLC (Wythe), was a New York-based music event company. Wythe consisted of two ownership groups, an

operating group and a real estate group. Wythe's primary business concerned the operation of a music venue called Output, located at 74 Wythe Avenue, Brooklyn, New York, that featured electronic dance music (EDM) events. The operating group held the majority ownership stake, and was comprised of three individuals: Shawn H. Schwartz, Nicolas Matar, and Robert T. Pittman.[1]

2. In April 2016, the Division of Taxation (Division) commenced an audit of petitioner's sales and use tax returns for the period September 1, 2013 through February 29, 2016. Pursuant to the audit, the Division sent petitioner an information document request, dated April 8, 2016, to which petitioner fully responded.

3. During the audit, the Division reviewed three areas: sales, expenses, and fixed assets. At the Division's request, petitioner consented to a test period of December 1, 2015 through February 29, 2016 for purposes of reviewing petitioner's sales and expenses. At the conclusion of the audit, the Division determined that additional sales and use taxes were due from petitioner with respect to its sales, expenses, and fixed assets, in the following amounts:

Sales	**Expenses**	**Fixed Assets**	**Total**
$547,419.69	$41,579.41	$3,753.66	$592,752.76

With respect to petitioner's audited sales, the Division determined that additional tax was due on petitioner's admission charges, and further determined that petitioner charged its customers the proper amount of tax "with respect to all sales other than admission charges." The Division asserted that petitioner's admission charges were taxable because "the concerts

[1] The petitions of Shawn H. Schwartz, Nicolas Matar, and Robert T. Pittman were filed in protest of notices of determination issued to them as persons responsible for the collection and payment of sales tax on behalf of petitioner Wythe (***see*** finding of fact 12). "Petitioner" as used throughout this determination refers to Wythe unless otherwise indicated.

performed at the night club do not fall under the category of 'live dramatic or musical arts' performances."

4. The Division issued two statements of proposed audit change for sales and use taxes due to petitioner dated June 14, 2019. The first statement of proposed audit change proposed additional sales and use tax due of $45,333.07, plus interest, with respect to petitioner's expenses and fixed assets, to which petitioner consented and this amount is not at issue in the present matter. The second statement of proposed audit change proposed additional sales tax due of $547,419.69, plus interest and penalty, with respect to petitioner's sales for the period September 1, 2013 through February 29, 2016.

5. The Division issued a notice of determination (assessment ID L-050377131), dated August 12, 2019, to petitioner asserting sales tax due for the period December 1, 2013 through February 29, 2016, plus interest and penalties, in the following amounts:

Tax Amount Assessed	**Interest Amount Assessed**	**Penalty Amount Assessed**	**Current Balance Due**
$547,419.69	$421,144.51	$218,953.71	$1,187,517.91

6. The Division also issued notice of determination (assessment ID L-050380564) to petitioner Nicolas Matar, dated August 13, 2019, asserting the same amount of tax as the notice of determination issued to petitioner on August 12, 2019. The notice of determination states, under the heading "EXPLANATION AND INSTRUCTIONS:"

> "This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.
>
> Our records indicate that you are/were an Officer/Responsible Person of:
> 74 WYTHE RESTAURANT COMPANY LLC."

7. In October 2019, the Division commenced another audit of petitioner's sales and use tax returns for the period March 1, 2016 through August 31, 2019. The Division sent petitioner an information document request, dated October 8, 2019.

8. Pursuant to the audit for the subsequent period, the Division requested that petitioners consent to extensions of the period in which to issue notices of determination. Petitioner Wythe, through its representative, executed a waiver dated July 22, 2020, and consented to extend the time for the Division to issue an assessment for the period March 1, 2017 through February 28, 2018 to March 20, 2021. Petitioner Nicolas Matar, via an executed waiver, dated February 20, 2020, consented to extend the limitations period relating to periods beginning March 1, 2016 and ending August 31, 2017 to September 20, 2020. Petitioner Shawn H. Schwartz, via an executed waiver, dated February 20, 2020, consented to extend the assessment limitations period relating to periods beginning March 1, 2017 and ending August 31, 2017 to September 20, 2020. Petitioner Robert T. Pittman did not consent to an extension of the assessment limitations period. In their petitions,74 Wythe and Messrs. Matar, Pittman, and Schwartz allege that they did not receive the notices in time to protest them.

9. During the audit on the subsequent period, the Division reviewed petitioner's sales, expenses, and fixed assets. With respect to its subsequent audit of petitioner's expenses and fixed assets, the Division did not access any additional tax. However, following a cursory review, the Division determined that petitioner's reported non-taxable sales from admission charges were subject to sales tax.

10. The Division sent a statement of proposed audit change to petitioner, dated July 31, 2020, proposing additional sales tax due of $822,933.16, plus interest and penalty, for the period

March 1, 2016 through August 31, 2019. The statement of proposed audit change was reissued to petitioner on August 31, 2020.

11. At the conclusion of the subsequent audit, the Division issued notice of determination (assessment ID L-051975049) dated September 8, 2020, addressed to petitioner at "97 N. 10th St., #2D, Brooklyn, NY 11249-1909," asserting sales tax due for the period March 1, 2017 through August 31, 2019 of $822,933.16, plus interest and penalties.

12. Shortly after issuing the notice of determination for the subsequent audit to petitioner, the Division claims to have issued notices of determination to Nicolas Matar (assessment ID L-052050778), Robert T. Pittman (assessment ID L-052050779), and Shawn H. Schwartz (assessment ID L-052050780), all dated September 16, 2020, asserting sales and use tax due of $822,933.16 for the period March 1, 2017 through August 31, 2019. These notices state, in relevant part, under the heading "EXPLANATION AND INSTRUCTIONS:"

> "This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.
>
> Our records indicate that you are/were an Officer/Responsible Person of:
> 74 WYTHE RESTAURANT COMPANY LLC."

13. Petitioner protested the notice of determination issued on August 12, 2019, by filing a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). Following a conciliation conference, BCMS issued a conciliation order (CMS No. 000313802), dated December 30, 2022, sustaining the notice of determination for the period December 1, 2013 through February 29, 2016. Petitioner Nicolas Matar also protested the notice of determination bearing assessment ID L-050380564 by filing a request for conciliation conference with BCMS. BCMS issued a conciliation order (CMS No. 000313803), dated January 13, 2023, to Mr. Matar, which sustained the notice of determination.

14. Petitioner initially protested the notice of determination, dated September 8, 2020 (assessment ID L-051975049), relating to the subsequent audit period, by filing a request for conciliation conference with BCMS. BCMS issued a conciliation order dismissing request (CMS No. 000328440), dated April 9, 2021, determining that such request was untimely filed. Petitioner Nicolas Matar protested the notice of determination (assessment ID L-052050778), dated September 16, 2020, by filing a request for conciliation conference with BCMS. BCMS issued a conciliation order dismissing request (CMS No. 000329622), dated June 18, 2021, determining that such request was untimely filed. Petitioner Robert T. Pittman protested the notice of determination (assessment ID L-052050779), dated September 16, 2020, by filing a request for conciliation conference with BCMS. BCMS issued a conciliation order dismissing request (CMS No. 000330136), dated June 18, 2021, determining that such request was untimely. Petitioner Shawn H. Schwartz protested the notice of determination (assessment ID L-052050780), dated September 16, 2020, by filing a request for conciliation conference with BCMS. BCMS issued a conciliation order dismissing request (CMS No. 000326788), dated February 12, 2021, determining that such request was also untimely filed.

15. Petitioners commenced this proceeding by filing individual petitions with the Division of Tax Appeals on May 7, 2021, July 12, 2021, January 12, 2023, and February 3, 2023, which were subsequently consolidated into the instant proceeding. These initial petitions were filed in protest of notice of determination (assessment ID L-050377131), dated August 12, 2019, asserting $547,419.69 in additional tax due from petitioner Wythe, plus interest and penalty, for the periods from December 1, 2013 through February 29, 2016 (DTA 850382), and notice of determination (assessment ID L-051975049), dated September 8, 2020, asserting $822,933.16 in additional tax due, plus interest and penalty, against petitioner Wythe for the

periods from March 1, 2017 through August 31, 2019 (DTA 830441). The petitions of petitioners Robert T. Pittman (DTA 830526), Shawn H. Schwartz (DTA 830440), and Nicolas Matar (DTA 830527 and 850405), protesting the Division's determinations that they were persons responsible for the collection and remittance of sales tax due from petitioner Wythe, were also consolidated into the instant proceeding.

16. The Division filed its answers to the petitions on July 21, 2021 (for DTA 830440, 830441), September 15, 2021 (for DTA 830527, 830526), April 19, 2023 (for DTA 850405), and March 22, 2023 (for DTA 850382). On March 31, 2023, petitioner Wythe served the Division with a demand for a bill of particulars (demand) requesting clarification of the statutory basis for the Division's proposed assessment against it. On April 23, 2023, the Division moved to vacate the demand, alleging it sought evidentiary material and attorney work product rather than an amplification of its answer. Petitioner responded to the motion on May 19, 2023, arguing that without a statutory or regulatory basis for the tax asserted in the notices of determination, petitioner could not effectively mount a challenge to the assessments at hearing, and, thus, the Division's motion to vacate should be denied. On August 17, 2023, the undersigned ordered the Division to provide the statutory basis or bases on which the Division based its determinations to assess additional sales tax. The Division responded on September 12, 2023, stating that it based its determination to assess sales tax on admission charges to Output on three alternative statutory provisions: Tax Law § 1105 (d), (f) (1), or (f) (3).

17. At the hearing, the Division presented the testimony of its auditor, Michelle Roman. Ms. Roman is a sales tax auditor 1 having worked for the Division for about 20 years. Pursuant to her duties as a sales tax auditor, Ms. Roman reviews taxpayers' books and records to ensure sales tax compliance. During her time with the Division, Ms. Roman has completed between

180 and 200 audits, although this was her first audit of a taxpayer selling tickets to performances. While conducting the audits of petitioner, Ms. Roman maintained a record of documents exchanged with petitioner and a log related to the audit, as is the typical practice of the Division, and which was offered into evidence.

18. Ms. Roman testified as to how she reached her conclusions regarding petitioner's business operations made during the course of the audit. She concluded that petitioner's venue, Output, constituted a nightclub based on her review of its Facebook page, noting that the pictures on its page featured a rooftop lounge. Ms. Roman also noted that Output served alcohol, but did not serve food, other than offering a food truck, during the first audit period.

19. Ms. Roman reported that she discussed with her audit team whether admission charges to Output were taxable under Tax Law § 1105 (f) (1). Ms. Roman testified that she, under advisement and in consultation with the Division's audit team leaders and section heads, concluded that petitioner's admission charges were subject to sales tax because DJs do not perform live music; rather, they are merely "using other people's records." Ultimately, Ms. Roman determined that Wythe's admission charges were subject to sales tax because "the performances do not fall under the live performance exemption." When pressed as to what would qualify for the exemption from sales tax, Ms. Roman offered that musical plays would qualify. When questioned further, Ms. Roman was unable to provide a meaningful definition of a live musical arts performance, instead deferring to the Division's field audit management's conclusion that DJ performances simply cannot constitute live musical arts performances and that qualifying live musical arts performances were limited to theatrical productions.

20. Ms. Roman concluded that petitioner's beverage sales were more than merely incidental for the first audit period, finding that such sales constituted 48.93% of total sales.

21. Ms. Roman testified that she was not sure if she concluded that petitioner's admission charges were subject to sales tax as the charges of a roof garden, cabaret, or similar place. Ms. Roman admitted that she never considered whether Output qualified as a roof garden, cabaret, or similar place for sales tax purposes, but rather based her conclusion regarding the taxability of its admission charges on her determination that the performances were not live musical performances and that petitioner sold food and drink at Output. Furthermore, Ms. Roman testified that while conducting the audit she did not review Tax Law § 1123, which provides for a sales tax exemption for admission charges to live musical or dramatic arts performances at a roof garden, cabaret, or similar place. Neither Ms. Roman nor anyone else from the Division attended any performances at Output or reviewed video of any such performances before determining that Output's admission charges were subject to sales tax.

22. Ms. Roman testified that she did not believe that she concluded that petitioner's admission charges were subject to sales tax under Tax Law § 1105 (d) and that she was unfamiliar with that particular section of the Tax Law.

23. Ms. Roman identified Nicholas Matar as a responsible person through petitioner's response to the information document request for the first audit period. Mr. Matar also filed petitioner's final New York State and local sales and use tax web filed return (form ST-810) on December 23, 2019, for the reporting period beginning September 1, 2019 and ending November 30, 2019. This final sales and use tax return for petitioner listed its address as "217 Havemeyer St. Ste 4, Brooklyn, NY 11211-6277."

24. Ms. Roman testified that the audit for the second audit period was carried out in a similar manner as the first, but that the review was cursory. After discussion with her audit team leader and audit section head, Ms. Roman decided to propose an assessment of additional sales

tax on petitioner's admission charges to Output as had been done in the first audit based on the fact that petitioner's business operations had not changed during the audit period.

25. On July 31, 2020, and August 31, 2020, the Division issued statements of proposed audit change addressed to petitioner Wythe at "74 Wythe Ave, Brooklyn, NY 11249." However, the notice of determination, dated September 8, 2020 was addressed to petitioner at "97 N. 10th St, #2D Brooklyn, NY 11249-1909." Petitioner denies effecting a change of address with the Division before September 8, 2020. While admitting at hearing that there was an apparent change to petitioner's address before issuance of the notice of determination for the subsequent audit period to petitioner, Ms. Roman was unable to explain why the Division used the North 10th Street address when it issued the notice on September 8, 2020.

26. Ms. Roman identified Robert T. Pittman and Shawn H. Schwartz as potential responsible persons during the course of the subsequent audit of Wythe by discovering their names on Wythe's application to register for a sales tax certificate of authority (form DTF-17).

27. At hearing, petitioner presented the testimony of Shawn H. Schwartz, a member of petitioner's operating group. Prior to becoming involved in petitioner, Mr. Schwartz had been involved in one way or another in the music industry for more than 30 years, including as a DJ, working for various record labels during the 1990s, starting his own record label, and opening a record store. Mr. Schwartz started working as Output's owner/operator in about 2011. Mr. Schwartz identified himself, Nicholas Matar, and Robert T. Pittman as members of petitioner's operating group.

28. Petitioner's principal business was operating a music venue in Brooklyn, New York, called Output. Mr. Schwarz reported that Output sold admissions to its events and beverages, and that, during its first year of business, Output charged sales tax on both categories of sales.

Mr. Schwartz testified that Output stopped charging sales tax on admissions to its music events, following advice from its controller that admissions to live musical performances were exempt from sales tax.

29. Mr. Schwartz testified that from the beginning, Output focused on the music of its featured artists and rejected the "bottle service" business model then-prevalent in New York City nightclubs. Upon arrival, patrons would enter Output from Wythe Avenue and proceed to the ticket booth and then to the coat check area before entering the main space. Output featured four interconnected spaces, including the main space, an ancillary space called the "Panther Room," a rooftop area, and a side lounge that was intended to become a restaurant that never materialized. The main space featured a second-floor mezzanine that wrapped around the main space in order to provide patrons with a better view of the stage. Each space at Output had a bar where patrons could purchase beverages. Output was able to host more than one event at a time, as the main space and the Panther Room were divided by a soundproof barrier.

30. Mr. Schwartz emphasized the importance of the sound design within Output, recalling that they worked very closely with a sound design company, Funktion One, to install a sound system capable of producing the wide range of sound frequencies featured in electronic music. It was petitioner's goal to produce one of the best sound systems in America.

31. Mr. Schwartz testified that while Output had no set days of operation, on days it was open it was usually open from 10 P.M. to sometime between 4 A.M. and 7 A.M. Output also hosted daytime rooftop events on weekends during the summer months, running from 2 P.M. to 9 P.M. Output was never open on days it did not host an event. Output's music events only featured DJs and the venue never played a radio station or a commercially available album over its sound system when it was open to the public. Output would customize its event marketing

strategy depending on the event and the DJ performing, using its own website, social media, online ticket sellers, and sometimes ads posted around New York City. Output would occasionally enter into multi-event contracts with DJs, and had its own resident DJs. The DJ lineup at Output included internationally known electronic dance music (EDM) artists, such as Horse Meat Disco, Honey Dijon, Disclosure, Pan-Pot, and Deadmau5, among others.

32. Output never offered drink specials in its ads, as it considered itself focused on the music and offering drink specials would be antithetical to that focus. Output did not run promotional nights, such as a "ladies' night" or "2-for-1" drink specials. Tickets usually ran $20.00 to $40.00, but occasionally as high as $60.00 for special events. Patrons could purchase tickets online beforehand or at the ticket booth at Output on the night of the event. Petitioner offered into evidence copies of receipts for admission charges at Output, ranging in dates from December 2015 to the end of February 2016. Each receipt included the date of admission and price paid. No receipt for admission charges included charges for food or beverage sales. According to Mr. Schwartz, the admission charge never included a credit for beverages at Output, nor was there ever a drink minimum. Ticket sales were Output's largest revenue center.

33. At the hearing, petitioner offered into evidence a price list of alcoholic beverages offered at Output. Mr. Schwartz testified that the drink prices at Output remained the same since its opening. The drink price sheet showed that drinks at Output ranged from $6.00 to $15.00, with one outlier at $26.00, with various additional charges for drinks being served up, on the rocks, or with Red Bull as a mixer. Mr. Schwartz reported that the drink prices at Output were comparable with other similar music venues in the vicinity, which he knew because he would visit Output's competition to observe their operations. Output's drink prices remained the same, whether or not an admission fee was charged. Local-market establishments such as TBA

Brooklyn, Avant Gardner, Good Room, Schimanski, and Elsewhere Brooklyn were Output's contemporaries and competitors. Petitioner offered into evidence a printout from its point-of-sale system showing prices of drinks at Output, as well as photos of competing venues' drink menus, which demonstrated that Output's drink prices were largely in line with its competitors.

34. Petitioner offered into evidence a place of assembly certificate of operation (certificate number 320476196), issued by the New York City Department of Buildings on January 1, 2013, designating Output as a cabaret under classification A-2, "Dance Hall (Food/Drink) Cabaret" and permitting up to 452 persons to occupy the space at a time. A printout attached to the certificate of operation indicated that the cabaret license was in effect from May 24, 2013 through September 30, 2018. Mr. Schwartz testified that based on his prior experience in operating another EDM venue, it was absolutely essential to petitioner's business model to qualify as a licensed, legally sanctioned venue where dancing would be allowed and, thus, a cabaret license was sought from the beginning.

35. At the hearing, the Division's representative waived the argument put forth in its answers that certain petitions filed in this consolidated matter, namely petitions designated DTA 830441 (Wythe), DTA 830527 (Nicolas Matar), DTA 830526 (Robert T. Pittman), and DTA 830440 (Shawn H. Schwartz), were untimely filed. At the hearing, the Division offered no evidence of its mailing procedures or whether such procedures were followed in issuing the notices of determination.

36. At the hearing, petitioner presented the testimony of Mark J. Butler, PhD. Dr. Butler earned his doctorate in music theory in 2003 from Indiana University. He earned his master of music degree from the University of Cincinnati in 1996 and his bachelor of music in piano performance, with highest distinction, from the University of North Carolina at Chapel Hill in

1993. Dr. Butler's dissertation topic was on the rhythmic structure of EDM. From 2003 to 2009, Dr. Butler was an assistant professor of music at the University of Pennsylvania. Between 2009 and 2021, Dr. Butler served as an associate and full professor of music theory and cognition at Northwestern University. Since October 2021, Dr. Butler has been employed as a professor of popular music studies at Humboldt University of Berlin. He is the author of two books on popular music and DJ-based musical composition: *Playing with Something That Runs: Technology, Improvisation, and Composition in DJ and Laptop Performance* (New York, Oxford University Press, 2014) and *Unlocking the Groove: Rhythm, Meter, and Musical Design in Electronic Dance Music* (Bloomington, Indiana University Press, 2006), and the recipient of numerous awards, grants, and fellowships related to his research. Following questioning of his qualifications from petitioners' representative, Dr. Butler's curriculum vitae was accepted into evidence at the hearing and he was qualified as an expert witness in music.

37. Dr. Butler described his area of research as focusing on popular music, and especially groove-based popular music and EDM. He described groove-based popular music as music that is based on a rhythmic basis or foundation that drives the music. Dr. Butler described groove-based popular music as having an intersection with EDM.

38. Dr. Butler testified at the hearing regarding what constitutes a live musical performance. Music, according to Dr. Butler, is human-organized sound created for humans to perform, move to, and/or listen to and expresses values, culture, and emotions. A musical performance is a performance wherein music is created. According to Dr. Butler, when a performance is live, the performance is understood and perceived as an event that is happening at a particular place and time and is therefore unique and not reproducible.

39. Dr. Butler described EDM as an umbrella term for music that is predominately or entirely electronic in terms of its means of production. This kind of music is made with devices such as synthesizers, samplers and sequencers, and is performed with devices such as turntables and mixing boards. EDM typically features a relatively fast tempo and is rhythmically steady with a prominent beat. EDM also features layers of texture that build up gradually and the artist introduces textural play, that is, adding and subtracting instruments and building up to climaxes with the beat. There are many subgenres of EDM, including house, techno, trance, and drum and bass, among others. EDM is typically performed with turntables, either analog or digital, and such performances feature at least 2 turntables connected to a mixing board, allowing the DJ to control the elements of texture in the composition. EDM DJs often use laptop computers, specialized software, sequencers, samplers, drum machines, and effects peddles in production of their music.

40. Dr. Butler described a DJ in this context as a musical performer who creates electronic music with turntables and mixing boards. A DJ is central to a performance of EDM in that he or she is there to interact with observers and to create a unique performance that will entice them to dance. The performance is created by the DJ selecting recordings and recombining them in a variety of ways to produce a unique mix that has not been heard before. On the mixing board, the DJ can isolate different frequencies to emphasize them or downplay them to the point of inaudibility to create a sound that has not been heard before. It is the DJ manipulating tracks, or individual units of songs analogous to songs, that creates dynamism and liveliness, and what makes it a musical performance.

41. Dr. Butler testified about the improvisational and creative elements that the DJ employs to achieve an emergent quality from combining two tracks that is, in effect, a novel

composition sometimes referred to as the "third record." Dr. Butler also described the technical skills required of a DJ to perform successfully, including the ability to match the beat of the track that is currently playing to the beat of a track that the DJ is planning on adding to the mix. He distinguished DJ performances in this sense from a wedding or radio DJ. In the case of a wedding or radio DJ, there is no transition or beat matching between tracks, thus it lacks the quality of a continuous unified musical performance. A wedding or radio DJ is just allowing a device to play back the track without any musically creative intervention.

42. Dr. Butler explained that DJs also perform using laptops running specialized software and typically having some kind of physical controller with buttons, knobs, and sliders allowing the DJ to manipulate the sound. A laptop performance might feature more of the performer's own music, but there is no difference of fundamental techniques employed in a laptop performance. At the hearing, Dr. Butler viewed videos of EDM performances, including a video of EDM artist Richie Hawtin performing at Output, and described the techniques Mr. Hawtin used in the course of his performance. Mr. Hawtin had performed at Output numerous times between 2013 and 2018. Dr. Butler opined that DJ sets and laptop performances, including Mr. Hawtin's live set at Output that was viewed at the hearing, were live musical arts performances.

SUMMARY OF THE PARTIES' POSITIONS

43. Petitioners argue that admission charges to Output are not subject to sales tax because the admission charges constitute charges for admission to musical arts performances, which are exempted from sales tax by Tax Law §§ 1105 (f) (1) and 1123. Petitioners maintain that they demonstrated that EDM DJ performances of the type it hosted at Output were live musical arts performances for purposes of the Tax Law, and thus the charges for admission

thereto are exempt from sales tax. Petitioners contend that the Division's interpretation of Tax Law § 1105 (d) is irrational and impermissible in that it effectively nullifies the sales tax exemptions provided for under Tax Law §§ 1105 (f) (1) and 1123. Petitioners argue that because its interpretation of the statute is the only reasonable interpretation, the notices of determination must be cancelled.

Petitioners also argue that the notice of determination issued to petitioner Wythe, dated September 8, 2020, was improperly issued, in that the notice was not addressed to its last known address as required by Tax Law § 1138 (a) (1). Petitioners contend that when the Division fails to properly issue the statutory notice to the taxpayer's last known address, the notice must be canceled. Petitioner also calls attention to the fact that if the notice of determination, dated September 8, 2020, was improperly issued, the time for the Division to cure the defect and issue a valid notice of determination has since lapsed (***see*** Tax Law § 1147 [b]). Petitioners argue that the Division has similarly failed to bear its burden of proof regarding proper issuance of the notices of determination to Shawn H. Schwartz, Robert T. Pittman, and Nicolas Matar on September 16, 2020, and, thus, those notices must also be canceled.

44. The Division argues that Output's admission charges were subject to sales tax under one of three statutory bases: under Tax Law § 1105 (f) (1), which imposes sales tax on admission charges to places of amusement; or, alternatively, under Tax Law § 1105 (f) (3), which imposes sales tax on admissions to roof gardens, cabarets, and similar places; or, alternatively, under Tax Law § 1105 (d), which imposes sales tax on purchases of food and beverages in restaurants, taverns, and other establishments, and includes any cover charge or charge for entertainment in taxable receipts. The Division further argues that the exemptions from sales tax for admission charges to live dramatic or musical performances available under Tax Law §§ 1105 (f) (1)

(relating to admissions to places of amusement) and 1123 (relating to admissions to roof gardens, cabarets and similar spaces) are not available to petitioner, as the events at Output did not qualify as admissions to live musical arts performances for purposes of those sales tax exemptions.

The Division denies petitioner's allegation that the Division did not issue the notice of determination, dated September 8, 2020, to petitioner at its last known address. The Division argues that, as petitioners have been permitted to pursue their protest rights in a hearing on the merits, they have not been prejudiced. The Division contends that an error or defect in the notice is immaterial when it causes no harm or prejudice and thus does not justify rendering the proposed assessment void.

CONCLUSIONS OF LAW

A. The Tax Law imposes sales tax on every admission charge to or for the use of a place of amusement, except for charges for admission to dramatic or musical arts performances, among other exceptions (***see*** Tax Law § 1105 [f] [1]).

B. The Tax Law also imposes sales tax on amounts paid as charges of a roof garden, cabaret or other similar place (***see*** Tax Law § 1105 [f] [3]). The definition of "roof garden, cabaret or other similar place" includes any roof garden, cabaret or other similar place that furnishes a public performance for profit, but does not include a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances (***see*** Tax Law § 1101 [d] [12]). Tax Law § 1123 provides for an exemption from sales tax for admission charges to roof gardens, cabarets and similar places where the amount paid represents a charge for admission to attend a dramatic or musical arts performance. This exemption from sales tax is applicable only if: a) the roof

garden, cabaret or similar place states the charge for admission to the dramatic or musical arts performance separately from all other portions of such amount; b) either the charges for food, drink, service and merchandise are not less on a day when such place offers such a performance as on a day when such place does not offer such performance, or if such place is open for business only when it offers a dramatic or musical arts performance, it separately states its charges for food, drink, service and merchandise and such separately stated charges are comparable to charges made by roof gardens or similar places in the same locale for comparable food, drink, service and merchandise; and c) the roof garden or similar place retains and makes available menus and any other statements of its charges for food, drink, service, merchandise and admission (Tax Law § 1123 [a]-[c]).

C. The definitions provided under Tax Law § 1101 offer guidance in interpreting the terms in Tax Law § 1105 (f). An "admission charge" is defined as "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101 [d] [2]). An "amusement charge" is "[a]ny admission charge, dues or charge of roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [3]), while a "charge of a roof garden, cabaret or other similar place" is defined as "[a]ny charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [4]). A "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101 [d] [10]), including "a theatre of any kind ... or other place where a performance is given" (20 NYCRR 527.10 [b] [3] [i]). Possibly most important among these is the definition of a "dramatic or musical arts admission charge," which is "[a]ny admission charge paid for

admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance" (Tax Law § 1101 [d] [5]).

D. Determining whether admission charges qualify for an exemption from sales tax is not a new issue for this forum (***see Matter of 1605 Bookcenter, Inc.***, Tax Appeals Tribunal, July 25, 1991, ***confirmed*** 188 AD2d 694 [3d Dept 1992], ***affd*** 83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994]; ***see also Matter of 677 New Loudon Corp.***, Tax Appeals Tribunal, April 14, 2010, ***confirmed*** 85 AD3d 1341 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***cert denied*** 571 US 952 [2013]). Notably, both Tax Law §§ 1105 (f) (1) and 1123 contain exemptions from sales tax for admission charges for, as relevant here, live musical arts performances at places of amusement or at roof gardens, cabarets or similar places. Thus, determining whether the events petitioner produced at its venue, Output, qualified as live musical arts performances is key to determining whether the admission charges for such events are exempt from sales tax under Tax Law § 1105 (f) (1) or (f) (3).

E. The Tax Law presumes that all of a taxpayer's sales receipts from amusement charges are subject to tax until the contrary is established and the taxpayer has the burden of proof in that regard (***see*** Tax Law § 1132 [c] [1]). It is well established that "[s]tatutes are to be construed according to the ordinary meaning of their words" and in accord with their legislative intent (***see Matter of American Food & Vending Corp.***, Tax Appeals Tribunal, July 30, 2015, ***confirmed*** 144 AD3d 1227 [3d Dept 2016]), and "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (***Matter of Charter Dev. Co., LLC v City of Buffalo***, 6 NY3d 578, 581 [2006], quoting ***Matter of Tall Tress Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington***, 97 NY2d 86, 91 [2001]). Exemptions from tax are to be strictly construed against the taxpayer (***see Matter of United Parcel Serv., Inc. v Tax Appeals Trib.***, 98 AD3d 796,

798 [3d Dept 2012], ***lv. denied*** 20 NY3d 860 [2013]; ***see also Matter of 677 New Loudon Corp.***; ***Matter of Grace v State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 193 [1975]). Thus, a taxpayer seeking an exemption from tax must show that its construction of the underlying statute is not only plausible, but also that it is the only reasonable construction (***Matter of Forest City Realty Trust, Inc. v Tax Appeals Trib.***, 188 AD3d 1317, 1318 [3d Dept 2020]; ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 111-112 [3d Dept 2013]). However, when construing such statutes, the court's interpretation must not be so narrow and literal as to defeat the settled purpose (***Matter of Grace v State Tax Commn***., 37 NY2d at 196).

F. First, we look to the ordinary meaning of a key statutory term. The term "live" is defined as "of or involving a presentation (such as a play or concert) in which both the performers and an audience are physically present" or "at the actual time of occurrence: during, from or at a live production" (*Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/live, [retrieved March 7, 2024]).

The ordinary meaning of the word "live" accords with Dr. Butler's description of live musical performances by EDM DJs, in that such performances involved real-time musical presentations at which both the performers and the audience were physically present. Dr. Butler described the techniques that EDM DJs employ in order to create unique and unreproducible performances, including using turntables, mixing boards, specialized software, sequencers, samplers, drum machines and effects peddles to add or subtract different sounds and alter the tempo to create a new composition. An EDM DJ is central to an EDM performance through his or her interaction with the audience and creating a unique performance that entices them to dance. It is the EDM DJ's manipulation of tracks and building of texture in real time that creates dynamism and liveliness in the set and ultimately what makes it a musical performance. He

contrasted an EDM DJ performance with a wedding or radio DJ merely playing back a track without any musically creative intervention. Dr. Butler opined that DJ sets and laptop performances, including the video viewed at the hearing of a particular performance at Output, constituted live musical arts performances.

Petitioner's construction of "live musical arts performance" is in stark contrast with the Division's interpretation of the term, which concluded, a priori, that EDM DJ performances cannot constitute live musical performances because they are merely "using other people's records." Evidence produced by petitioner at the hearing clearly refuted that claim, especially the description by Dr. Butler of the real-time interaction between the DJ and the audience in the performance space. Furthermore, the Division was unable to point to a statutory or regulatory provision limiting the exemption for admission charges to live musical arts performances to Broadway-type theatrical productions, despite its reliance on that construction. Considering the Division never actually visited Output to observe the performances it claims did not qualify as live musical performances, it is difficult to see how it reached its determination that such performances were not live musical arts performances. At the very minimum, one would have expected the Division, upon audit, to review the statutory provisions petitioner was relying on to assert its qualification for the exemption from sales tax for the admission charges here at issue, if for no other reason than to distinguish petitioner's construction from its own. But at the end of the day, we are left with little more than a baseless arbitrary distinction between the kinds of live musical arts performances that happened at Output and those happening in theaters on Broadway.

Normally one need not venture further than the ordinary meaning of the words used in the statute if their meaning is clear and unambiguous (***Matter of American Food & Vending***

Corp.; ***Matter of Charter Dev. Co., LLC v City of Buffalo***, 6 NY3d at 581). However, the meaning of the words used and the ultimate statutory construction must comport with the Legislature's intent (***id.***). In this instance, the Legislature provided a clear statement of its intent in the bill jacket accompanying Assembly Bill 11594, which added Tax Law § 1123 and clarified that the sales tax exemption for admission charges to live dramatic or musical arts performances applies to such performances at roof gardens, cabarets and similar places (Sponsor's Memo, Bill Jacket L 2006 Ch. 279 of the Laws of 2006). According to the sponsor's statement, the purpose behind Assembly Bill 11594 was to equalize the tax treatment between those kinds of venues and other venues and eliminate the subjective "merely incidental" food, refreshment or merchandise sales standard to determine taxability of admission charges (***id***. at 3) . Furthermore, according to the sponsor's statement, the explicit purpose of the legislation was to ensure that "all venues offering live musical and dramatic arts performances are allowed the same exemptions, providing those members of the entertainment industry with similar benefits" including venues such as "jazz clubs and dance halls" (***id***.). Notably, the former Commissioner of Taxation and Finance, Andrew Eristoff, noted no objections to the bill in his letter of support to the governor (Letter from St Tax Dept, Bill Jacket, L 2006, ch 279 at 9).

Petitioner has met its burden of demonstrating that its interpretation of the term "live musical arts performances" as including the DJ performances at Output as live musical arts performances that are not Broadway-like theatrical productions was the only reasonable construction of the statutory language. Petitioner's interpretation of "live musical arts performances" comports not only with the plain meaning of the words used, but also accords with the Legislature's explicit intent to ensure equal tax treatment for admissions to live musical

arts performances at all venues. Thus, petitioner's admission charges are not subject to sales tax under Tax Law § 1105 (f) (1).

G. It must also be determined whether Output qualifies as a roof garden, cabaret or similar place under Tax Law § 1105 (f) (3). A roof garden, cabaret or similar place is defined, in relevant part, as "[a]ny roof garden, cabaret or other similar place which furnishes a public performance for profit . " (Tax Law § 1101 [d] [12]). Output charged its patrons for admission to performances, and Mr. Schwartz's description of Output's business operations indicated that it was operated in a manner consistent with a profit motive. Although not dispositive on the matter, petitioner's seeking out and obtaining a New York City Department of Buildings place of assembly certificate of operation designating Output as a cabaret under classification A-2, "Dance Hall (Food/Drink) Cabaret" lends credence to petitioner's claim that it operated as and was treated as a dance hall or cabaret. The Division seems to agree that Output qualified as a roof garden, cabaret or similar place, and stated so in its brief:

> "[t]his definition [of a nightclub] fits within the definition for 'roof garden[,] cabaret, or other similar place' set out in Tax Law § 1101(d)(12), and more significantly, it accurately describes the type of venue Output was. Output required a cabaret license to operate, they featured DJs, dancing, and refreshments, and [was] clearly akin to a roof garden, cabaret or similar place."

H. Having determined that the performances at Output were live musical arts performances for purposes of the Tax Law, we must now turn to the requirements of Tax Law § 1123 to determine whether the admission charges qualify for the sales tax exemption. As mentioned above, Tax Law § 1123 provides for a sales tax exemption for admission charges to a live musical arts performance at a cabaret, roof garden or similar space (***see also*** Tax Law § 1105 [f] [3]) where: a) the charge for admission is separate from the charge for food, refreshment or merchandise; b) if such a place is only open when it offers such a performance, the separately

stated charges for food, drink, service and merchandise are comparable to charges in nearby similar establishments; and c) the cabaret, roof garden or similar place retains and makes available menus and any other statements of its charges, including charges for food, drink, and admission (***see*** Tax Law § 1123 [a] - [c]).

According to the testimony of Shawn H. Schwartz, Output was never open on a day that it did not host an event. The copies of ticket charge slips offered into evidence at the hearing did not bear food or drink charges, and according to Mr. Schwartz, admission charges never included a credit for beverages nor was there a drink minimum at Output. The printout of drink prices at Output showed that its drink prices were comparable to Output's nearby competitors. The Division accepted petitioner's reported beverage sales for both audit periods before proposing the assessments here at issue. There is no evidence in the record that petitioner failed to make its drink price list and statements of its beverage and admission charges available to the Division upon request as required.

The facts here indicate that Output was a roof garden, cabaret or similar space, that its admission charges were for live musical arts performances and that it complied with the requirements of Tax Law § 1123. Accordingly, Output qualified as a roof garden, cabaret or similar place for purposes of Tax Law § 1105 (f) (3) and its admission charges qualified as admission charges to live musical arts performances under Tax Law § 1123, and, thus, were not subject to sales tax.

I. The Tax Law also imposes sales tax on the receipts from every sale, other than sales for resale, of food and drink of any nature when sold in or by restaurants, taverns or other establishments, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers, subject to exemptions not otherwise applicable here

(***see*** Tax Law § 1105 [d] [i]; ***see also*** 20 NYCRR 527.8; ***Matter of Edward Yager and Patrick McKeon d/b/a California Brew Haus***, Tax Appeals Tribunal, March 23, 1989).

J. When Tax Law § 1105 (d) is viewed in light of the exemptions from sales tax in Tax Law §§ 1105 (f) (1) and 1123, specifically the inclusion of a cover or entertainment charge in taxable receipts of food and beverages sold in restaurants, taverns or other establishments, it becomes clear that the Legislature intended to grant an exception to the general rule of inclusion in taxable receipts of such entertainment charges where that cover or entertainment charge is for admission to a live dramatic or musical arts performance at a roof garden, cabaret or similar place (***compare*** Tax Law § 1132 [c] [1] [creating a general rule of inclusion in taxable receipts for amusement charges] ***with*** Tax Law § 1123 [creating an exemption from sales tax for admission charges to live musical arts performances at roof gardens, cabarets and similar places]). Proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature" (***Matter of 1605 Book Center Inc. v Tax Appeals Trib.***, 83 NY2d at 244-245, ***see also*** McKinney's Cons Laws of NY, Book 1, Statutes § 92 ["[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature"]). In this case, the rule of statutory construction that "[a] statute is to be construed with reference to earlier statutes in pari materia" (McKinney's Cons Laws of NY, Book 1, Statutes § 222) is equally applicable. It is presumed that the Legislature has knowledge of and takes cognizance of existing laws on the subject when it enacts a statute relating to the same subject matter (***New York State Thruway Auth. v Hurd***, Misc2d 181, 183-184 [Sup Ct, Albany County 1968], ***affd*** 31 AD2d 563 [3d Dept 1968], ***affd*** 25 NY2d 150 [1969]). If the Division's interpretation were to be accepted, Tax Law § 1105 (d) effectively

turns into a catch-all for imposition of sales tax on admission charges on any establishment offering food or drink, whether or not the admission charges are for live musical or dramatic arts performances. The Division's interpretation leaves no room for the exemption from sales tax for admission charges to live musical arts performances at roof gardens, cabarets or similar places, such as Output, where food and/or drink are offered for sale. This is not what the Legislature intended when it promulgated Tax Law § 1123, as evidenced by the language of the statute and confirmed by the intent expressed by the Legislature itself (***see*** Sponsor's Memo, Bill Jacket, L 2006, ch 279). Accordingly, petitioner has demonstrated that its interpretation of Tax Law § 1105 (d) is correct, given that the Legislature is presumed to have known that cover or entertainment charges were includable in taxable receipts of restaurants, taverns and other establishments under Tax Law § 1105 (d) when it created an exemption from sales tax for admission charges to live musical or dramatic arts performances when it adopted Tax Law § 1123.

K. Although the substantive issues presented have been resolved, in the interest of making a full determination on all issues presented, petitioners' procedural issue regarding timeliness of the notices will also be addressed. Petitioners argue that the notice of determination issued to petitioner Wythe, bearing assessment ID L-051975049 and dated September 8, 2020, relating to periods starting March 1, 2017 and ending August 31, 2019, was improperly issued, in that the notice was not addressed to its last known address as required by Tax Law § 1138 (a) (1). Petitioners allege that petitioner Wythe never changed its mailing address with the Division, having used "74 Wythe Ave, Brooklyn, NY 11249" address at all times during the audit. In addition, according to petitioners, the Division did not issue the notice to the address given in the last return filed with Division, as required by Tax Law § 1147 (a) (1).

Petitioners reference petitioner Wythe's final New York State and local sales and use tax web filed return (form ST-810), filed on December 23, 2019, that indicated a mailing address for petitioner at "217 Havemeyer St. Ste 4, Brooklyn, NY 11211-6277." However, the Division appears to have addressed the notice of determination to an address of unknown origin, namely, "97 N 10th St., #2D, Brooklyn, NY 11249-1909." Petitioners contend that when the Division fails to properly issue the statutory notice to the person or persons liable for the collection and/or payment of sales tax at their last known address, or to the address given in their last return filed or application made to the Division, such error is fatal and the notice must be canceled. Petitioner also calls attention to the fact that if the notice of determination, dated September 8, 2020 was improperly issued, the time for the Division to cure the defect and issue a valid notice of determination has since lapsed (***see*** Tax Law § 1147 [b] [providing for a three-year statute of limitations on assessment]).

The Division, in its answer, denies petitioners' allegation that the Division did not issue the notice of determination, dated September 8, 2020, to petitioner Wythe at its last known address. However, the Division did not provide any evidence of its mailing procedures, or how it obtained the address to which it sent the notice or proof of its mailing. Instead, the Division argues that, as petitioner has been permitted to pursue its protest rights in a hearing on the merits, petitioner has not been prejudiced by this error. The Division contends that an error or defect in the notice is immaterial when it causes no harm or prejudice and thus does not justify rendering the proposed assessment void (***see e.g. Matter of NEGAT, Inc.***, Tax Appeals Tribunal, April 9, 1992; ***Matter of Pepsico, Inc. v Bouchard***, 102 AD2d 1000 [3d Dept 1984]).

L. In ***Matter of Karolight, Ltd.*** (Tax Appeals Tribunal, February 8, 1990), the Tax Appeals Tribunal (Tribunal) found that where a notice of determination is properly mailed to a

taxpayer's last known address, but the presumption of receipt is rebutted, the 90-day period for requesting a hearing under Tax Law § 1138 will not be triggered and the taxpayer would be entitled to a hearing (***id.***; ***see Matter of Ruggerite, Inc. v State Tax Commn***, 97 AD2d 634 [3d Dept 1983], ***affd*** 64 NY2d 688 [1984]). The Tribunal has held that where the Division has failed to establish the date of mailing of a statutory notice, actual receipt of the notice can be inferred from a taxpayer's request for a BCMS conference, and the filing of the same will trigger the 90-day period within which to bring a protest of the notice (***Matter of Kayumi***, Tax Appeals Tribunal, June 27, 2019).

M. Under Tax Law § 1138 (a) (3) (B), a formal protest of a sales or use tax notice of determination filed by a business automatically constitutes a formal protest on behalf of any responsible persons who subsequently receive a notice of determination with respect to the same sales or use tax liability (***see also*** TSB-M-98[12]S, *Consolidation of Protest Procedures for a Sales or Use Tax Notice of Determination or Notice and Demand*, September 1, 1998).

N. The notice of determination (assessment ID L-051975049) addressed to petitioner Wythe is dated September 8, 2020. Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division bears the burden of establishing that the statutory notice was properly issued (***see Matter of Novar TV & Air Conditioner Sales & Svc., Inc.***, Tax Appeals Tribunal, May 23, 1991; ***see also Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). Although the Division has not borne its burden of showing proper issuance of the September 8, 2020 notice to petitioner at its last known address, it appears from the conciliation order dismissing petitioner's request (CMS No. 000328440) that petitioner Wythe requested a conciliation conference on March 19, 2021. As March 19, 2021, is the date that is deemed to start the 90-day period for petitioner Wythe to

formally protest the notice of determination, dated September 8, 2020, petitioner Wythe's protest of the notice of determination was timely filed, and, thus, petitioner Wythe was entitled to a hearing on the merits (***see Matter of Kayumi***).

O. Like petitioner Wythe, petitioners Matar, Pittman, and Schwartz allege in their answers that they did not receive the notices of determination in time to protest them, but unlike petitioner Wythe, they do not allege that the Division failed to issue the notices to their last known addresses. However, petitioner Wythe's timely filing of its protest of the notice of determination, dated September 8, 2020, effected formal protests on behalf of petitioners Matar, Pittman, and Schwartz by operation of Tax Law § 1138 (a) (3) (B), as the notices issued to them concerned the same underlying sales or use tax liability. As a result, petitioners Matar, Pittman, and Schwartz were entitled to a hearing on the merits of their protests of the notices of determination issued to them as persons responsible for the collection and payment of sales and use tax.

P. The petitions of 74 Wythe Restaurant Company, LLC, Shawn H. Schwartz, Robert T. Pittman, and Nicolas Matar are granted. The notices of determination dated August 12, 2019, August 13, 2019, September 8, 2020, and September 16, 2020, are canceled.

DATED: Albany, New York
June 6, 2024

/s/ Alejandro G. Taylor
ADMINISTRATIVE LAW JUDGE